

3. More important, the petition omits discussion of the impact of the Missouri rule in any other state. Petitioner identifies no state that permits local sales and uses *and* matches Missouri's definition of "use." Thus it is not surprising that Petitioner never claims that the Missouri holding can be applied elsewhere today. Petitioner is really asking for the Court to scare away a ghost – to "discourage other states from *adopting* similar" use tax schemes. Petition at 9 (emphasis added).

4. Perhaps equally significant, Petitioner omits mention that because of how Missouri defines "use," whether to incur the "higher" local use tax is within the control of the seller and buyer. Whether Petitioner purchases an item from a seller in Kirkwood or purchases it out-of-state and has it shipped to Kirkwood, it will pay tax at the same rate. If Petitioner purchases an item from a seller in Williamsburg, Petitioner will pay a small local sales tax. But if Petitioner purchases the item out of state and has it shipped to Williamsburg, it will pay no local use tax at all.

Neither Kirkwood nor Williamsburg, by adopting local sales or use taxes, nor the State, by authorizing such adoption, discriminates *against* out-of-state sellers.

True, Kirkwood is one of "361 [Missouri] taxing jurisdictions [that] impose a use tax that is greater than the lowest sales tax . . . charged by some 137 [other] cities and counties." Petition at 8. But neither Kirkwood nor any other city or county itself charges a higher use than sales tax. With its assurance that every city and county must treat out-of-state sellers as well as or better than local sellers, Missouri's scheme does not create the threat of harm that would merit review by this Court.

5. Finally, there is no reason to hold the petition pending the disposition of *Daimler Chrysler Corp. v. Cuno*, No. 04-1704, *cert. granted* Sept. 20, 2005, and *Wilkins v. Cuno*, No. 04-1724, *cert. granted* Sept. 27, 2005. Those cases involve challenges to a part of Ohio's tax scheme that provides incentives, in the form of tax credits, to businesses that invest in the state. The Court of Appeals held, based on a novel interpretation of Commerce Clause jurisprudence, that the tax scheme impermissibly encouraged in-state investment that hindered free trade among the states. Here, an entirely different tax scheme is at issue: a use tax, permissible under *Associated Industries*, that is not implicated in *Cuno*.

CONCLUSION

For the reasons state above, the petition should be denied.

Respectfully submitted,

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No. 05-452

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**In The
Supreme Court of the United States**

KIRKWOOD GLASS CO., INC.,

Petitioner,

v. —

MISSOURI DIRECTOR OF REVENUE,

Respondent.

**On Petition For Writ Of Certiorari
To The Supreme Court Of Missouri**

**PETITIONER'S REPLY TO
RESPONDENT'S BRIEF IN OPPOSITION**

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**PETITIONER'S REPLY TO
RESPONDENT'S BRIEF IN OPPOSITION**

1. Respondent cannot and does not dispute that Missouri's patchwork pattern of sales and use taxes incentivizes many Missouri residents (including petitioner) to buy from vendors in low-sales-tax Missouri cities and counties to the detriment of vendors from the other 49 states. So respondent ignores the fact that the State of Missouri is discriminating but argues instead that neither the City of Kirkwood nor the City of Williamsburg discriminates (Br. in Opp. at 4, 8). But the Commerce Clause focuses on commerce "among the several states," not between a single city or county in one state and some other state. The State of Missouri, by reason of its enabling legislation, is the constitutional culprit here, just as it was in *Associated Industries of Missouri, Inc. v. Lohman*, 511 U.S. 641 (1994).

2. Respondent's garbled account of the conflicting Ohio decision in *American Modulares Corp. v. Lindley*, 376 N.E.2d 575 (Ohio), *cert. denied*, 439 U.S. 911 (1978), professes an inability to understand how the Ohio use tax worked (Br. in Opp. at 7). The court's very opinion recites that the use tax was levied "on any property purchased out of state but *stored, used or otherwise consumed* in the state." *Id.* at 575, citing Ohio R.C. 5741.02 (emphasis added). These are precisely the same attributes of dominion that trigger the use tax under § 144.610 RSMo., which imposes the tax "for the privilege of storing, using or consuming" property in Missouri. Respondent's confusing attempt to suggest that *American Modulares* involved a different kind of use tax is thus misconceived.

3. There can be no dispute that the Ohio Supreme Court's holding is flatly at odds with the Missouri Supreme Court's analysis in this case. Even though, as here, the sales and use taxes were required to be paired within each taxing jurisdiction, the *American Modulares* court struck down the state enabling law:

"We, therefore, hold that R.C. 5741.021 is unconstitutional insofar as its application imposes a higher tax rate on property purchased out of state and used in a taxing county than on similarly used property purchased in the state." *Id.* at 578.

Since respondent squarely joins issue with petitioner on the merits and indicates no procedural or jurisprudential obstacles to the petition, the Court should grant certiorari to resolve this important issue regarding the extent to which a state may utilize the inherently-protective use tax to disfavor out-of-state commerce.

Respectfully submitted,

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